MEMORANDUM

DATE: March 27, 2007

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-C: Proposed amendments relating to Rules 11 of the Rules governing 2254 and 2255 proceedings

The Criminal Rules Committee is currently considering a proposed new Criminal Rule 37, a proposed new Rule 11 of the Rules governing proceedings under 28 U.S.C. § 2254, and an amendment to Rule 11 of the Rules governing proceedings under 28 U.S.C. § 2255. The proposed amendments are explained in the enclosed memo from Professors Beale and King to the Criminal Rules Committee. As that memo notes, the proposed new Criminal Rule 37 has been the subject of extensive debate; that proposal, however, does not directly concern the Appellate Rules Committee. By contrast, the Rule 11 proposals are of direct interest to the Appellate Rules Committee: If adopted, the Rule 11 proposals would render it advisable for the Appellate Rules Committee to consider conforming amendments to the Appellate Rules.

The Criminal Rules Committee tentatively approved the Rule 11 proposals last fall, and the proposals are action items on the agenda for the Criminal Rules Committee's mid-April meeting. If, as expected, the Criminal Rules Committee decides to seek the Standing Committee's permission to publish the proposed Rules for comment this summer, then it would be desirable for the Appellate Rules Committee to seek publication of the conforming amendments at the same time. This memo explains the proposed amendments to FRAP 4(a)(4)(A) and 22.

I. Proposed amendment to FRAP 4(a)(4)(A)

Professors Beale and King explain that the Rule 11 proposals "are intended to provide, for the first time, a well-defined mechanism by which litigants can seek reconsideration of a district court's ruling on a motion under" the Rules governing proceedings under 28 U.S.C. §§ 2254 and 2255. As they explain, "[t]he efforts by litigants to work around the current procedural gap – particularly by using Federal Rule of Procedure 60(b) – have generated a good deal of confusion."

Under proposed Rule 11(b) in each set of Rules,

> The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the [movant's / petitioner's] conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may only raise a defect in the integrity of the [§ 2255 / § 2254] proceedings. Federal Rule of Civil Procedure 60(b) may not be used in [§ 2255 / § 2254] proceedings.

The brackets in the above quotation show the wording proposed for the Section 2255 and Section 2254 Rules, respectively. The exact text of each proposed provision is set forth in the enclosed memo.

As can be seen from the above, the proposal would remove the availability of Civil Rule 60(b) motions in Section 2254 and Section 2255 proceedings, and would substitute a motion under Rule 11(b). Presumably, the policy questions raised by this choice are outside the scope of the Appellate Rules.[1]

If the Rule 11 proposals are adopted, then the Appellate Rules Committee should consider revising Appellate Rule 4(a)(4)(A) to state the effect of a timely Rule 11(b) motion on the time to take an appeal. The amendment would read as follows:

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure — or a motion for reconsideration under Rule 11(b) of the Rules Governing Proceedings

[1] My earlier memo to Professors Beale and King, which is enclosed in their memo, raises a question concerning the proposed Rule 11(b)'s effect on the availability of postjudgment motions under Civil Rules 52 or 59. The answer to that question, though, does not affect the proposed conforming amendment to Appellate Rule 4

under 28 U.S.C. §§ 2254 or 2255 —; the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days[2] after the judgment is entered.

* * * * *

Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. Subdivision (a)(4)(A) is revised to provide that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other motions listed in subdivision (a)(4)(A).

II. Proposed amendment to FRAP 22

As the Notes to the proposed Rules 11 explain, the amendments are also designed to make 28 U.S.C. § 2253's certificate-of-appealability requirements more prominent by placing them in the Section 2254 and Section 2255 Rules. In light of this proposed change, the Criminal

[2] NB: Changes stemming from the Time-Computation Project make it likely that this 10-day limit will be changed to 30 days.

Rules Committee also asks the Appellate Rules Committee to consider a conforming amendment to Appellate Rule 22.

Appellate Rule 22(b)(1) currently provides:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

The proposed amendments to 2254/2255 Rules 11 would add a new Rule 11(a) that provides:

> Certificate of Appealability. At the same time the judge enters a final order adverse to the [moving party / applicant / petitioner], the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). [If the judge denies a certificate, the judge must state why a certificate should not issue.]

The brackets in the first sentence of the above quotation show the wording proposed for the Section 2255 and Section 2254 Rules, respectively. The exact text of each proposed provision is set forth in the enclosed memo.

Proposed Rule 11(a) would alter the timing of the district court's certificate-of-appealability decision by requiring the judge to grant or deny the certificate at the time a final order is issued, rather than after a notice of appeal is filed. I am assuming that the policy judgment embodied in that decision is one for the Criminal Rules Committee, rather than the Appellate Rules Committee.

The final bracketed sentence in the proposed Rule 11(a) reflects a suggestion that I made to Professors Beale and King. Aside from the issue of timing, the proposed Rule 11(a) differs from existing Appellate Rule 22(b)(1) in that Rule 11(a) would not require the district court, if it denies the certificate, to "state why."

Rule 22(b)'s requirement of a statement of reasons for the denial is of long standing The requirement dates as far back as the time – pre-AEDPA – when the required certificate was a "certificate of probable cause." The pre-AEDPA Rule 22 provided: "If an appeal is taken by the

applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue." The original 1967 Committee Note to Appellate Rule 22 explained the requirement of an explanation for the denial of the certificate as follows: "In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial."

When Congress re-wrote Rule 22 as part of AEDPA, it added a requirement that the district court explain *grants* of the certificate, but it did not delete the requirement that the district court also explain *denials*. The rewritten rule read in part: "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court." 110 Stat. 1214, 1218 Although the Rule has been amended since then, the substance of this requirement remains.

I therefore suggested to Professors Beale and King that it would be a significant change if Rule 11(a) were to require explanations only for grants and not for denials of the certificate. Failing to require explanation of denials would deprive the Court of Appeals of information relevant to the Court of Appeals' consideration of any request for a certificate of appealability. And deleting the requirement for explanation of denials would delete a requirement that Congress itself retained when it rewrote Appellate Rule 22 as part of AEDPA.

For this reason, I suggested that the following sentence be added to the end of each proposed Rule 11(a): "If the judge denies a certificate, the judge must state why a certificate should not issue." Assuming that the Criminal Rules Committee adopts that suggestion, the conforming amendment to Appellate Rule 22(b)(1) could read as follows:

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U S.C. § 2253(c). ~~If an applicant files a~~

~~notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.~~ The district clerk must send the certificate ~~or~~ , if any, and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been moved from subdivision (b)(1) to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255. Subdivision (b)(1) continues to require that the district clerk send the certificate, if any, and the statement of reasons for grant or denial of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

Encls.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**
Professor Nancy King

RE: **Proposed Amendments to Rule 11 of the Rules Governing 2254 and 2255 Proceedings; Proposed New Rule 37**

DATE: **March 25, 2007**

In January of 2006, the Department of Justice proposed a series of amendments intended abolishing the writs of coram nobis, coram vobis, audita querela, and bill of review and bills in the nature of bills of review, and proposing amendments that take the place of these writs Judge Bucklew appointed a subcommittee to review the Department's proposals The committee is chaired by Professor King, and includes Judge Bucklew, Judge Trager, Mr. McNamara, and the Justice Department's representative The subcommittee reviewed the proposal and draft amendments were discussed at the Committee's October meeting.

The Rule 11 proposals

The amendments to Rule 11 of the Rules governing 2254 proceedings, and to Rule 11 of the Rules governing 2255 proceedings were tentatively approved by the Committee at the October meeting They are intended to provide, for the first time, a well-defined mechanism by which litigants can seek reconsideration of a district court's ruling on a motion under these rules. The efforts by litigants to work around the current procedural gap – particularly by using Federal Rule of Procedure 60(b) – have generated a good deal of confusion.

Outstanding issues for Committee consideration.

On March 15, the Reporter of the Appellate Rules Committee, Professor Struve, submitted to Professors King and Beale a set of comments suggesting changes to the proposed Rules Her suggestion to add language retaining the judge's duty to state "why a certificate should not issue" is included in brackets. She also inquires how the proposal would affect motions under Rule 52 or 59. Professor Struve's memo is also attached. Because of the timing of her comments, the subcommittee did not have the opportunity to consider her queries

Proposed Rule 37

The original proposal for a new Rule 37 would have (1) subjected coram nobis actions to timing, successive petition, and other limitations similar to those applicable to 2255 actions, and (2) abolished all of the other ancient writs. The Committee discussed this proposal as well as alternative language for Rule 37 proposed by Mr. McNamara at the October meeting The alternative version would provide no set statute of limitations but allow for dismissal in some circumstances upon a showing of prejudice to the government as a result of delay, and would not have abolished the writs so that they would continue to serve as a kind of insurance policy to provide needed flexibility in the future. The Committee asked the subcommittee to continue working, raising a number of concerns about the proposed new rule

The subcommittee considered submissions on these questions from both the Department of Justice and Mr. McNamara (see the two memos dated January 5, 2007 to Professor King) The revised version of the proposed Rule 37 approved by a majority of the subcommittee and submitted for Committee consideration here includes one substantive change from the version considered by the Committee in October. Instead of purporting to "abolish" writs, the proposed rule states only that the specified writs "may not be used to seek relief from a criminal judgment " Two non substantive changes made to the language of the rule· (1) the language limiting the use of the writs formerly constituting subdivision (c) of the rule is moved to be part of subsection (a); and (2) the references to statutes and rules in subsection (a) have been reordered and reorganized

The proposed Committee Note to accompany Rule 37 is a shorter version of the Note that appeared in the October agenda book. In response to the concerns voiced by several members of the Committee in October, it adds references to existing law governing coram nobis actions to make it clear that the proposed rule is not intended to change these aspects of the existing coram nobis remedy The changes in brackets in paragraph 5 of the Note were added to respond to the concern voiced by members of the subcommittee that the Note did not contain specific examples of loss of employment as "serious adverse consequences." These particular changes in the text of the Note have not been considered by the subcommittee.

Outstanding issues for Committee consideration.

(1) Mr McNamara opposes the proposed rule and favors tabling the proposal entirely If the Committee decides to go ahead with a new rule on this topic, he suggests an Alternate Version, which is included here immediately after the Proposed Rule 37 and accompanying Note

(2) Style changes to the text of the rule have been proposed, but not yet considered by the subcommittee The style suggestions for the text of the rule are attached at the end of this section.

(3) Professor Cooper has suggested, in particular, that the phrase "or by appeal as authorized by federal statute" be substituted for the enumerated list of appellate provisions in subdivision (a) of the proposed rule, so as not to eliminate either parties' existing ability to employ mandamus and

prohibition, or cut off other existing interlocutory appellate review of orders (bail, wiretaps, forfeiture orders) that might be considered "judgments " This was received after the subcommittee completed its deliberations

(4) Reporters from other Committees have expressed serious reservations about proposed Rule 37. Input from the other reporters was solicited after the subcommittee had completed its deliberations, so was not considered by the subcommittee

At the January meeting of the Standing Committee, following Judge Bucklew's description of our work on Rule 37, the reporters expressed serious reservations about the wisdom of going forward with the proposed amendment to Rule 37 at this time I attempt here to outline these comments Professor Coquillette may wish to expand upon them at the meeting

One ground of concern was that any attempt to restrict the ancient writs would be viewed with alarm by Congress and the public, becoming conflated with attempts to restrict judicial review of various kinds of cases, such as the detention of persons as enemy combatants or otherwise who have not been charged with a crime The subcommittee attempted to address this concern by eliminating the language that "abolished" the ancient writs The current draft provides, instead, only that the ancient writs "may not be used to seek relief from a criminal judgment." Although this would clearly have no application to cases where terrorists, enemy combatants, or others are held without being charged with a crime, the reporters expressed concern that this distinction would be lost to the public, Congress, and pundits

Several reporters also expressed, in the strongest terms, an even more fundamental concern They advised against seeking to codify entirely the ancient writs. It would not matter, in their view, if the text of the rule coincided exactly with the Supreme Court's previous decisions defining the scope of coram nobis Since the writs are always subject to further judicial development and application to new circumstances, codification thus necessarily loses something – though we might not know exactly what – if it seeks preclude judicial relief that does not fall within the statutory boundary This is unwise, and possibly beyond the scope of the authority granted by the Rules Enabling Act, since it may modify a substantive right

There has been some discussion among the reporters about the question whether Civil Rule 60(b) establishes a precedent for the proposed criminal rule Rule 60(b) was amended in 1948 to abolish the "ancient writs " The Committee Note explains that the writs had continued in use after Rule 60(b) was adopted as part of the original 1938 Rules, "although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery " The amendment was designed as "a clarification of this situation " After "ascertain[ing] all the remedies and types of relief heretofore available by" the ancient writs, the Committee "endeavored * * * to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief * * * " If the Committee succeeded in its purpose, "the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice " Rule 60(b) and the ongoing independent action were intended to provide a more modern

procedure to provide for all relief that could be granted under any of the more mysterious ancient writs At a minimum, anything done in the Criminal Rules should do the same· ensure that the available grounds of relief are not diminished Some reporters, however, would take the position that in abolishing the ancient writs, Rule 60(b) runs afoul of the advice described above, which would leave open the possibility of further development of the writs, as opposed to the independent statutory actions

Finally, the reporters noted that it might be wise, before proceeding, to determine if the proposed rule is needed to address a real problem in practice At the moment, there is no reliable study of the use of the ancient writs The Federal Judicial Center could undertake such a study

PART A. RULE 11 ELEMENTS OF THE PROPOSED AMENDMENTS TO COLLATERAL RELIEF PROCEDURES

(1) Rule 11 of the Rules Governing Section 2255 Proceedings shall be amended to read as follows:

Rule 11. Certificate of Appealability; Motion for Reconsideration; Appeal

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the [moving party] applicant, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U S C. § 2253(c)(2) [If the judge denies a certificate, the judge must state why a certificate should not issue.]

(b) Motion for Reconsideration. The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration. The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the movant's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may only raise a defect in the integrity of the § 2255 proceedings. Federal Rule of Civil Procedure 60(b) may not be used in § 2255 proceedings.

(c) Time for Appeal Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules These rules do not extend the time to appeal the original judgment of conviction

Advisory Committee Notes

As provided in 28 U S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L A R. 22 2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed R App P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2255 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U S C § 2255 Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief Invocation of that civil rule, however, has "has generated confusion among the federal courts " Abdur'Rahman v. Bell, 537 U.S 88, 89 (2002) (Stevens, J ,

dissenting from the dismissal of certiorari as improvidently granted), In re Abdur'Rahman, 392 F 3d 174 (6th Cir 2004), *vacated*, 125 S. Ct. 2991 (2005), Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir 2004); *see also* Pitchess v Davis, 421 U S 482, 490 (1975) Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive applications *See* Gonzalez v Crosby, 125 S Ct 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings " 125 S Ct at 2648, 2651

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S Ct at 2648-49 & n 5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn 4-5, 2651 (emphasis by Court). Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court. Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2255 and the finality of criminal judgments

(2) Rule 11 of the Rules Governing Section 2254 Proceedings shall be renumbered Rule 12, and a new Rule 11 shall be enacted to read as follows:

Rule 11. Certificate of Appealability; Motion for Reconsideration

(a) Certificate of Appealabilty At the same time the judge enters a final order adverse to the [moving party] petitioner, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). [If the judge denies a certificate, the judge must state why a certificate should not issue.]

(b) Motion for Reconsideration The only procedure for obtaining relief in the district court from a final order is through a motion for reconsideration The motion must be filed within 30 days after the order is entered. The motion may not raise new claims of error in the [movant's] petitioner's conviction or sentence, or attack the district court's previous resolution of such a claim on the merits, but may raise only a defect in the integrity of the § 2254 proceedings.Federal Rule of Civil Procedure 60(b) may not be used in § 2254 proceedings.

Advisory Committee Notes

As provided in 28 U.S C § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts Rule 11(a) also requires the district judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A R. 22 2, 111 3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R App P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

The Rules Governing Section 2254 Proceedings have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U S C § 2255 Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief Invocation of that civil rule, however, has "has generated confusion among the federal courts " Abdur'Rahman v Bell, 537 U.S 88, 89 (2002) (Stevens, J , dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F 3d 174 (6th Cir. 2004), *vacated*, 125 S Ct 2991 (2005), Pridgen v Shannon, 380 F.3d 721, 727 (3d Cir 2004), *see also* Pitchess v Davis, 421 U S 482, 490 (1975) Convicted defendants have invoked Rule 60(b) to evade statutory provisions added by AEDPA in 1996, including a one-year time period for filing, the certificates of appealability requirement, and the limitations on second and successive

applications *See* Gonzalez v Crosby, 125 S. Ct 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"). The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as successive habeas petitions if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." 125 S. Ct at 2648, 2651.

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing § 2254 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2254 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id at 2648 & nn.4-5, 2651 (emphasis by Court) Defects subject to motion under Rule 11 include purely ministerial or clerical errors in the order of the district court Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of §§ 2254 and 2255 and the finality of criminal judgments

PART B. PROPOSED NEW RULE 37**

Rule 37. Review of the Judgment.

(a) Exclusive Remedies. The sole procedures for seeking relief from a judgment in a criminal case are by motion as authorized by 18 U S C §§ 3582 and 3600, 28 U S C § 2255, Rules 33, 35, and 37(b), or by appeal as authorized by 18 U S C § 3742, 28 U S C. §§ 1291 and 2253, and the Federal Rules of Appellate Procedure Writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment

(b) Writ of Error Coram Nobis.

(1) Requirements A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U S C § 2255, except that

(A) at the time of filing of the motion, the moving party must not be in custody, within the meaning of 28 U.S C. § 2255, as a result of the judgment for which relief is being sought; and

(B) the moving party must demonstrate that he is subject to a continuing and serious adverse consequence from the judgment

(2) Exception to period of limitation A motion that does not meet the 1-year period of limitation in § 2255 may be considered if it is filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence A motion filed under this paragraph must be dismissed if the government has been prejudiced by delay in filing the motion There is a rebuttable presumption of prejudice if the motion was filed more than five years after date of conviction

(3) Second or successive motion. If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U S.C § 2255, seeking relief from that judgment, the motion shall be regarded as a second or successive motion and shall be subject to the requirements for second or successive motions under 28 U S C § 2255

Advisory Committee Notes to Rule 37

This Rule is designed to regularize the collateral review of federal criminal judgments Rule 37(a) recognizes that, with the exception of coram nobis, the common law writs of error subsumed in the All Writs Act of 1791, 28 U S C. § 1651, namely coram vobis, audita querela, bills of review, and bills in the nature of a bill of review, have been effectively superseded by

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**The language supported by Mr McNamara is reprinted following the committee note

statutes and the Federal Rules of Criminal Procedure The rule makes clear that it is improper to resort to these writs to challenge a criminal judgment

Subdivision (a) lists the appropriate avenues of relief from a criminal judgment Under the current Criminal Rules, defendants can seek post-judgment relief as provided in Rule 33(b)(1) (new trial for newly discovered evidence) and Rule 35(a) (correcting clear error in the sentence) Rule 34, though entitled "Arresting Judgment," requires that the motion be filed within 7 days of the verdict or plea, and thus is not truly a post-judgment remedy. Defendants can also seek post-judgment relief as provided in 18 U S.C. § 3582(c)(2) (modification of an imposed term of imprisonment based on certain amendments to the sentencing guidelines), 18 U S C § 3600(g) (motion for a new trial or re-sentencing after exculpatory DNA testing), and 28 U S.C § 2255 Section 2255 in turn authorizes resort to the writ of habeas corpus under 28 U S C § 2241 if a § 2255 motion is "inadequate or ineffective " Courts have held § 2255 motions inadequate and ineffective when a defendant wishes to file a successive motion on the grounds that his statutory offense has been reinterpreted to render the defendant's conduct non-criminal See e g., Christopher v Miles, 342 F.3d 378, 382 (5th Cir. 2003). The Government can seek post-judgment relief under Rule 35(a) and (b) and under 18 U S C. § 3582(c)(2), and by appeal under 18 U S.C § 3731 Finally, defendants and the Government can both seek post-judgment relief by appeal where authorized by 18 U.S.C § 3742, 28 U.S C. § 1291, 28 U S C § 2253, and the Federal Rules of Appellate Procedure. Subdivision (a) does not alter the requirements of these other rules and statutory sections in any way. It also does not affect the alteration or termination of probation, supervised release, fines, restitution, or criminal forfeiture as elsewhere provided by these Rules or by statute See, e g ,18 U S C. §§ 3563, 3572, 3583, 3664

Subdivision (b) recognizes that the writ of coram nobis retains the limited role of providing an avenue for collateral relief to defendants who are not "in custody" within the meaning of § 2255 These include defendants who did not receive a custodial sentence, or whose custodial sentence is insufficiently long to permit a resort to both an appeal and collateral review Godoski v United States, 304 F.3d 761, 762 (7th Cir. 2002); United States v. Monreal, 301 F.3d 1127, 1132 (9th Cir 2002). Under subdivision (b) a motion seeking coram nobis relief must meet all the requirements applicable to a motion under § 2255 other than the "in custody" requirement, which is replaced by a requirement that the defendant demonstrate that he is subject to a continuing and serious adverse consequence from the judgment The Committee concluded that making the § 2255 requirements equally and uniformly applicable to writs of error coram nobis is most consistent with, and best embodies, congressional intent as it relates to collateral review of criminal convictions

A defendant's motion in the district court seeking either § 2255 or coram nobis relief must show either a constitutional error or an error "of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid" and "inherently results in a complete miscarriage of justice " United States v. Addonizio, 442 U S 178, 185-87 (1979), Reed v Farley, 512 U S 339, 353 (1994); Morgan, 346 U S at 504 (denial of counsel) The decision whether that error may be a factual error "material to the validity and regularity of the legal proceeding itself,"Carlisle, 517 U S at 429, or "a fundamental error of law," United States v. Sawyer, 239 F.3d 31, 38 (1st Cir 2001), is determined under the law applicable to § 2255 motions

Subdivision (b)(1)(B), which requires that the defendant show that he is subject to a continuing and serious adverse consequence from the judgment, reflects present case law holding that a person seeking coram nobis relief must show a concrete threat of serious harm arising from the judgment E g , Morgan, 346 U S at 503-04 (conviction used to enhance subsequent sentence); Fleming v United States, 146 F 3d 88, 90-91 (2d Cir. 1998) [(collecting decisions finding consequences that would support the writ, including deprivation of the right to vote, sentencing enhancement), United States v Esogbue, 357 F 3d 532, 534 (5th Cir. 2004) (deportation)], Howard v. United States, 962 F.2d 651, 654 (7th Cir 1992);[Dean v. United States, 436 F Supp 2d 485 (E D N Y 2006) (employment terminated because of conviction)]. This assures that the defendant is actually being seriously harmed by his conviction, speculative harms, harms to reputation, and harms not directly arising from his conviction are insufficient Nothing in this Rule is intended to change the scope of "continuing and serious adverse consequences," which the [lower] courts[~~of appeals~~] have found support the issuance of writs of error coram nobis

Under subdivision (b)(1), a motion for coram nobis relief generally must be filed within one year of the triggering events specified in § 2255 ¶ 6 Although at common law, coram nobis was "allowed without limitation of time," defendants were required to show "sound reasons for failure to seek earlier relief " Morgan, 346 U S. at 507, Foont v United States, 93 F 3d 76, 80 (2d Cir 1996). Similar admonitions against delay were at first applied to motions under § 2255, but Congress ultimately decided that requiring that § 2255 motions be made within one year of specified triggering events was a clearer and better method to prevent abuses and promote the finality of judgments. Just as defendants subject to ongoing imprisonment are required to file within those one-year periods, the Committee believes defendants who are subject to collateral consequences generally should also have to file within those one-year periods.

The only exception, embodied in subdivision (b)(2), is if the defendant demonstrates that the motion was filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence This exception is similar to § 2255 ¶ 5(4) and to former Rule 9(a) of the Rules Governing § 2255 proceedings Elaborating on former Rule 9(a), subdivision (b)(2) provides such a motion must be dismissed if the delay in filing the motion has prejudiced the government, either in responding to the motion, in retrying the case, or otherwise, and provides that prejudice is presumed if the motion is filed more than five years after the date of conviction The concepts of "due diligence" and "prejudice" are drawn as well from present case law, and nothing in this Rule is intended to change the meaning of these terms as defined by the courts of appeals

Subdivision (b)(3) provides that if a motion for coram nobis relief is filed after an earlier coram nobis motion or a motion under § 2255 has been filed seeking relief from that judgment, the motion is regarded as a second or successive motion and must meet the requirements of § 2255 ¶ 8 See 28 U S.C. § 2244(b), United States v Noske, 235 F 3d 405, 406 (8th Cir 2000), United States v. Swindall, 107 F.3d 831, 836 n 7 (11th Cir 1997) Rule 37(b)(3) would allow to

the same extent as § 2255 a successive motion on the basis that the defendant's statutory offense has been reinterpreted to render the his conduct non-criminal.

Under subdivision (b), a defendant may not appeal from the denial of a motion for coram nobis relief unless the district judge or a circuit justice or judge issues a certificate of appealability, as required in § 2255 cases 28 U S C § 2253(b). Fed R App P 22(b)

Because a motion for a writ of error coram nobis "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding," Morgan, 346 U.S. at 506 n 4, the motion and all proceedings upon it should be docketed in the criminal case in which the challenged judgment was entered Nonetheless, because this Rule subjects such motions to the same requirements that are applied to motions under § 2255, the Rules Governing Section 2255 Proceedings for the United States District Courts are equally applicable to motions for writs of error coram nobis

ALTERNATIVE VERSION OF PROPOSED RULE 37(b)

Rule 37. **Review of the Judgment.**

(b) Writ of Error Coram Nobis.

(1) Requirements. A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S.C. § 2255, except that

(a) at the time of filing of the motion, the defendant must *not* be in custody within the meaning of 28 U.S.C. § 2255,

(b) the defendant must demonstrate that he is subject to a continuing and serious adverse consequence from the judgment; and

(c) there is no statute of limitations for filing. A motion may be dismissed if the government has been prejudiced by delay in filing the motion, unless the movant shows that the motion is based on grounds he could not have had learned by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred

(2) Second or successive motion. If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U.S.C. § 2255, seeking relief from that judgment, the motion shall be regarded as a second or successive motion and shall be subject to the requirements of 28 U.S.C. § 2255, paragraph 8.

Style suggestions - Rule 37

Rule 37. Review of the Judgment.

(a) Exclusive Remedies. The sole procedures for seeking relief from a judgment in a criminal case are by motion as authorized by 18 U.S.C §§ 3582 and 3600, 28 U S C. § 2255, ~~Rule~~ **Rules** 33, 35, and 37(b) ~~of these Rules~~, or by appeal as authorized by 18 U S C. § 3742, 28 U S C §§ 1291 and 2253, and the Federal Rules of Appellate Procedure Writs of error coram vobis, audita querela, bills of review, and bills in the nature of a bill of review may not be used to seek relief from a criminal judgment.

(b) Writ of Error Coram Nobis.

(1) Requirements A motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case must meet all the requirements applicable to a motion under 28 U.S C § 2255, except that

(A) at the time of filing of the motion, the moving party must not be in custody, within the meaning of 28 U.S C. § 2255, as a result of the judgment for which relief is being sought; and

(B) the moving party must demonstrate that ~~he~~ **it** is subject to a continuing and serious adverse consequence from the judgment

(2) Exception to period of limitation ~~A~~ **A court may consider a** motion ~~that does not meet~~ **filed after** the 1-year period of limitation in § 2255 ~~may be considered~~ **only** if it is filed within one year of the date when the continuing and serious adverse consequence from the judgment could have been discovered through the exercise of due diligence**, unless** ~~A motion filed under this paragraph must be dismissed if~~ the government has been prejudiced by delay in filing the motion There is a rebuttable presumption of prejudice if the motion was filed more than five years after date of conviction

(3) Second or successive motion If a motion for a writ of error coram nobis to obtain relief from a judgment in a criminal case is filed after the filing of a prior such motion, or a motion under 28 U S.C. § 2255, seeking relief from that judgment, the motion ~~shall be regarded as~~ **is** a second or successive motion ~~and shall be~~ subject to the requirements for second or successive motions under 28 U S C § 2255

MEMORANDUM

DATE: March 14, 2007

TO: Sara Beale
Nancy King

FROM: Cathie Struve

RE: Amendments relating to Rules 11 of the Rules governing 2254 and 2255 proceedings

Thank you for sharing the proposed amendments to these Rules with me. I have a few questions concerning these amendments – and the conforming amendments to the Appellate Rules – and I wanted to run them by you I have not yet run these thoughts by anyone from the Appellate Rules Committee, and I haven't yet run the language past Joe Kimble for style review, I hope you don't mind my inflicting my very preliminary ideas on you! I look forward to your guidance on these issues.

I. Certificates of appealability

Appellate Rule 22(b)(1) currently provides.

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U S C § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U S.C § 2253(c) If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

The proposed amendments to 2254/2255 Rules 11 would add a new Rule 11(a) that provides

> At the same time the judge enters a final order adverse to the [moving party] applicant, the judge must either issue or deny a certificate of appealability If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U S C § 2253(c)(2)

Aside from the issue of timing, the proposed Rule 11(a) differs from existing Appellate Rule 22(b)(1) in that Rule 11(a) would not require the district court, if it denies the certificate, to "state why " Rule 22(b)'s requirement of a statement of reasons for the denial is of long standing The requirement dates as far back as the time – pre-AEDPA – when the required certificate was a "certificate of probable cause " The pre-AEDPA Rule 22 provided "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue " The original 1967 Committee Note to Appellate Rule 22 explained the requirement of an explanation for the denial of the certificate as follows "In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial " When Congress re-wrote Rule 22 as part of AEDPA, it added a requirement that the district court explain *grants* of the certificate, but it did not delete the requirement that the district court also explain *denials* The rewritten rule read in part "If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court " 110 Stat 1214, 1218 Although the Rule has been amended since then, the substance of this requirement remains

I therefore think it would be a significant change if Rule 11(a) were to require explanations only for grants and not for denials of the certificate Failing to require explanation of denials would deprive the Court of Appeals of information relevant to the Court of Appeals' consideration of any request for a certificate of appealability. And deleting the requirement for explanation of denials would delete a requirement that Congress itself retained when it rewrote Appellate Rule 22 as part of AEDPA

For this reason, I would suggest that the following sentence be added to the end of each proposed Rule 11(a) "If the judge denies a certificate, the judge must state why a certificate should not issue "

I would then recommend to the Appellate Rules Committee that it consider the following conforming amendment to Appellate Rule 22(b)(1).

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U S.C § 2253(c) ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue~~ The district clerk must send the certificate ~~or~~ , if any, and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S C. §§ 2254 or 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate

* * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been

moved from subdivision (b)(1) to Rule 11(a) of the Rules Governing Proceedings under 28 U S C §§ 2254 or 2255. Subdivision (b)(1) continues to require that the district clerk send the certificate, if any, and the statement of reasons for grant or denial of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings

II. Extending the time to file a notice of appeal

The amendment to Appellate Rule 4(a)(4)(A) seems quite straightforward, the way that I would propose to implement it is shown below I welcome your comments on it

If you will forgive me for intruding into questions that do not concern appellate procedure, I wanted to ask a question about the way in which proposed new Rule 11(b) will work The draft states that a motion for reconsideration under Rule 11(b) is the *only* way to obtain relief from a final order, and also states that such a motion may raise *only* a defect in the integrity of the proceedings.

I can see from the Note that the goal here is – following *Gonzalez v Crosby* – to foreclose the use of Rule 60(b) as an end-run around AEDPA's limitations. My question is what effect Rule 11(b) will have on postjudgment motions under Rules 52(b) or 59(b) Such motions occur after judgment, and thus it seems possible that Rule 11(b) could be read to bar them Of course, as you know, these motions have long been available in habeas proceedings, *see Browder v Director, Dept of Corrections of Illinois*, 434 U.S 257, 271 (1978). And though I am not sure what the parameters of the *Gonzalez* Court's "integrity of the proceedings" limit are, I would assume that it would exclude a number of grounds that currently can provide a basis for a motion under Rules 52 or 59 The *Gonzalez* Court did not discuss whether its reasoning would apply with equal force to Rule 52 or 59 motions. And since the Committee Note doesn't explicitly discuss Rule 11(b)'s effect on either of those motions, I just wondered about it

In any event, thank you for your patience with this inquiry, I realize that it's outside the ambit of the Appellate Rules. If Rule 11(b) is adopted, then I would propose that the Appellate Rules Committee consider the following amendment to Appellate Rule 4(a)(4)(A)

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure or the Rules Governing Proceedings under 28 U S C §§ 2254 or 2255, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion

(i) for judgment under Rule 50(b) [of the Federal Rules of Civil Procedure],

(ii) to amend or make additional factual findings under Rule 52(b) [of the Federal Rules of Civil Procedure], whether or not granting the motion would alter the judgment,

(iii) for attorney's fees under Rule 54 [of the Federal Rules of Civil Procedure] if the district court extends the time to appeal under Rule 58 [of the Federal Rules of Civil Procedure],

(iv) to alter or amend the judgment under Rule 59 [of the Federal Rules of Civil Procedure],

(v) for a new trial under Rule 59 [of the Federal Rules of Civil Procedure], ~~or~~

(vi) for relief under Rule 60 [of the Federal Rules of Civil Procedure] if the motion is filed no later than 10 days[3] after the judgment is entered[-] , or

(vii) for reconsideration under Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255

* * * * *

Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. New subdivision (a)(4)(A)(vii) provides that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other postjudgment motions listed in subdivision (a)(4)(A).

[3] NB: Changes stemming from the Time-Computation Project make it likely that this 10-day limit will be changed to 30 days.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D C 20530*

January 5, 2007

MEMORANDUM

TO Professor Nancy J King
Chair, Subcommittee on
Extraordinary Writs

FROM Benton J Campbell
Acting Chief of Staff

SUBJECT: Questions Following the October Meeting of the Full Advisory Committee

This memorandum addresses the questions on extraordinary writs – including questions about the Committee's authority to regulate their use – posed during the relevant discussion at the Committee's October meeting and in your email of November 3, 2006. We look forward to discussing all of this further during our next conference call

1 Authority of the Committee to Regulate the Use of Extraordinary Writs

Several members of the Committee voiced concern that promulgating the proposed new Rule 37 would go beyond the authority of the Rules Committees These Committee members expressed concern that the proposed rule would affect substantive rights

As you know, the Rules Enabling Act explicitly prohibits the promulgation of any rule that would "abridge, enlarge or modify any substantive right " 28 U S C §2072(b) The proposed new Rule 37 does not affect substantive rights, but rather merely attempts to further regularize the procedures by which criminal judgments are collaterally attacked The best support for this is the consideration and promulgation of Rule 60(b) of the Federal Rules of Civil Procedure, which *abolished* the writ of error *coram nobis* and other extraordinary writs under the Rules Enabling Act process Rule 60(b) did not impact substantive rights, and the Committees that promulgated the rule so recognized (as did, implicitly, the Judicial Conference and the Supreme Court that approved the rule, and the Congress that passed on it). The Advisory Committee Note that accompanied the rule explicitly and quite clearly lays out that the goal of the rule is to regularize and codify the procedures by which final judgments can be attacked Fed R Civ P 60(b), Advisory Committee Note to the 1946 Amendment. The Note states unequivocally that the rule does not "define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief " *Id*

Reviewing courts have also recognized the promulgation of Rule 60(b) as a permissible exercise of the authority granted under the Act to regularize civil procedure In *Neely v United States*, 546 F 2d 1059, 1065 (3d Cir. 1976), the Third Circuit found that the abolition of *coram nobis* in Rule 60(b) was part of the usual rules enabling work of regulating the process of civil litigation and did not impact substantive rights The court stated that "[i]n abolishing *coram nobis*, as well as several other ancient procedural devices, Rule 60(b) did not, and indeed could not, 'abridge, enlarge or modify any substantive right,'" (*quoting* 28 U S C § 2072) The Rules Enabling Act provides "the power to prescribe general rules of practice and procedure," and the *Neely* court, as well as the Committees that promulgated Rule 60(b), found that the writs under consideration were a procedure for raising "substantive rights," not substantive rights in and of themselves If abolishing these writs was permissible under the Act, than surely limiting *coram nobis* and abolishing those same other writs in Rule 37 would not violate the Act "'The test must be whether a rule really regulates procedure – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.'" *Hanna v Plumer*, 380 U.S 460, 464 (1965), *quoting Sibbach v. Wilson & Co* , 312 U.S. 1, 14 (1941) By contrast, a rule that impermissibly alters substantive rights is one that modifies "the rules of decision by which [a] court [resolves disputes] " *Hanna*, 380 U S at 464-65

The proposed Rule 37 does not alter the rules of decision for any claim, but only the procedures for bringing the claim The writs regulated by the proposed rule are not the exclusive procedures for bringing these substantive claims The proposed Rule 37 expressly lists other procedures for bringing such claims, just as Rule 60(b) does in the civil context *See Neely*, 546 F 2d at 1065 The proposed Rule 37 eliminates no substantive right, but at most incidentally affects them And as the Supreme Court has stated "'[r]ules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of

that system of rules '" *Business Guides, Inc v Chromatic Communications Enterprises, Inc*, 498 U S. 533, 552 (1991), *quoting Burlington Northern R Co v Woods*, 480 U S 1, 5 (1987)

The procedures by which criminal judgments are attacked collaterally are the province of this Committee. Just as the Advisory Committee to the Civil Rules recognized in 1946 that "[i]t is obvious that the rules should be complete and define the practices with respect to any existing rights or remedies to obtain relief from final judgments," so we believe this Committee has the authority – and ought – to regularize the procedures by which final judgments in criminal cases are challenged There is considerable and increasing confusion as to availability of these extraordinary writs, and we believe this Committee should provide a clear set of rules for the consideration of collateral attack upon final judgments

2 Questions from Your Email of November 3, 2006

A. What is the meaning of "continuing" in the term "continuing and serious adverse consequence" . . . would a one-time problem count (i.e., inability to obtain particular employment)?

B. What is the meaning of "serious" adverse consequence? Would job loss count? Reputational injury? Is there settled case law out there defining this term or will this cut back on the present availability of *coram nobis* relief?

The requirement of continuing and serious adverse consequences is drawn from *Morgan* and the *coram nobis* case law. *E g*, *Fleming v United States*, 146 F.3d 88, 90-91 (2d Cir. 1998), *Hager v United States*, 993 F.2d 4, 5 (1st Cir 1993), *United States v Craig*, 907 F 2d 653, 657-60 (7th Cir. 1990);*United States v Bruno*, 903 F.2d 393, 396 (5th Cir. 1990), *United States v Osser*, 864 F.2d 1056, 1059 (3d Cir 1988) Under this case law, "continuing" means existing in the present day *Fleming*, 146 F 3d at 90 Legal inability to obtain particular employment would count if it was not speculative Id , Howard *v United States*, 962 F.2d 651, 654 (7th Cir 1992) Mere reputational loss (which exists for every conviction) would not be sufficient to make a conviction reviewable *Fleming*, 146 F 3d at 90; *United States v Keane*, 852 F 2d 199, 202-04 (7th Cir 1988) This case law will help define the terms, so the proposed rule will not cut back on what would have been available under this case law (although it may in the Ninth and Fourth Circuits, which have not yet adopted that case law, *Fleming*, 146 F.3d at n 3).

C. Who has the burden of proof on the question of prejudice to the government under the proposed rule? What do existing *coram nobis* cases say about this?

The burden of proof on prejudice is on the government, except that after five years there is a presumption of prejudice that the defendant could rebut, if he so chose. This presumption was drawn from former Rule 9(a) of the Rules Governing § 2255 and § 2254 Proceedings *E g* , § 2254 Rule 9, 1976 Advisory Committee Notes ("If the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner Otherwise, the state has the burden of showing such prejudice ") All § 2254 and § 2255 petitioners must now meet those statutes' one-year period of limitations (since the prejudice language here appears in subsection (b)(1)(C), which applies only if the defendant cannot meet § 2255's various one-year periods of limitations, it is appropriate and necessary) The *coram nobis* case law on this issue is scant *See Telink, Inc v United States*, 24 F 3d 42, 48 (9th Cir 1994) (noting that the District Court put the *prima facie* burden on the government)

D. What counts as prejudice to the government, prejudice in defending *coram nobis* action, prejudice in reprosecuting the petitioner, etc? Is this a change from present law?

The rule counts both prejudice in responding to the petition and prejudice in reprosecuting the petitioner Former Rule 9(a) counted the former, and *coram nobis* cases have counted both *E g* , *United States v Dyer*, 136 F.3d 417, 428 (5th Cir 1998), *Telink, Inc v United States*, 24 F.3d 42, 48 (9th Cir 1994); *Osser*, 864 F 2d at 1061 Considering the latter type of prejudice is particularly appropriate to petitions under subsection (b)(1)(C), which are brought outside of § 2255's various one-year periods, and indeed after custody is over, when records and evidence often must be destroyed due to storage constraints

E. How will prejudice be established, will this mean more evidentiary hearings?

Prejudice could be shown by proffer by the prosecutor, testimony of a law enforcement agent, or by other evidence It should not require any more than the single evidentiary hearing that may be necessary for the petitioner to establish the other requirements for *coram nobis*

F. What counts as "delay in filing the motion" - is passage of time enough, or must there be some negligence or fault on the part of the petitioner? When is a filing "delayed"?

The "delay in filing the motion" mean simply the passage of time; no negligence or fault is required This is because this language appears as part of the prejudice provision in subsection (b)(1)(C), which only applies where the petitions are brought outside of § 2255's various one-year periods, and which generously allows the petitioner to file within one year after the collateral consequences could have been discovered with due diligence This provision appropriately counterbalances that generosity by considering the prejudice to the government

G. Is the five year presumption of prejudice too short? Too long? Why five years?

See the answer to question C above. Five years is an appropriate period, given the degradation and loss of evidence, memory, witnesses, and prosecutorial personnel that will occur over five years.

H. How will this proposed rule limit access to DNA testing and potential exonerations? How does it interact with Rule 33 motions for newly discovered evidence?

18 U S C § 3600 will continue to provide for DNA testing and motions for exoneration Rule 33 will continue to allow new trial motions for newly discovered evidence Neither is impeded by the proposal.

I. Will the proposal change the ability or incentive of a defendant to challenge a prior conviction in a subsequent proceeding (i.e., arguing at sentencing or in a § 2255 application that a prior conviction lacked counsel)?

Defendants will have the ability to raise such challenges to the extent current law allows them. The proposal would change their incentive only if they have already voided a conviction using *coram nobis*, which removes the need to challenge it again

J. Should the list of available remedies surviving the rule include not just § 2241, but also Rules 34 and 59(b)?

Section 2241 is only available pursuant to § 2255 ¶ 5, and the proposal preserves § 2255 as a remedy, so listing § 2241 is unnecessary, confusing, and likely to generate a lot of improper § 2241 motions by defendants who ought to be filing § 2255 motions. Rule 34 motions have to be filed "within 7 days after the court accepts a verdict or .. plea of guilty," Fed. R. Crim. P. 34(b), and thus are not are not a method of challenging a criminal judgment (despite the rules use of the archaic term "arresting judgment") Rule 59(b) addresses magistrate's recommendations, which are not final judgments

Phone (919) 856-4236
Fax (919) 856-4477

Office of the Federal Public Defender
150 Fayetteville Street Mall, Suite 450
Raleigh, North Carolina 27601

Thomas P McNamara
Federal Public Defender

January 5, 2007

MEMORANDUM

TO: PROFESSOR NANCY J KING
Chair, Subcommittee on Extraordinary Writs

FROM: THOMAS P. McNAMARA
Federal Public Defender

VIDALIA V PATTERSON
Research and Writing Attorney

RE: PROPOSED RULE 37 ADDRESSING QUESTIONS RAISED DURING ADVISORY COMMITTEE MEETING

Whether Proposed Rule 37 Oversteps the Authority of the Rules Committee

Providing little guidance, the Rules Enabling Act generally states that the "rules shall not abridge, enlarge or modify any substantive right " 28 U S C § 2072 However, the Judicial Conference of the United States (JCUS) has provided further explanation, stating that the basic

charge to the Rules Advisory Committees is "[t]o study the rules of practice and procedure" in each committee's respective field JCUS- Jurisdiction of committees, Feb 2006 at 15 We would submit that, although *coram nobis* and other writs may be remedial in nature, by modifying and abolishing existing rights conferred by the writs, proposed Rule 37 affects substantive rights and thus lies outside the authority of the advisory committee as contemplated by both the Rules Enabling Act and the JCUS Moreover, we were unable to find cases in which the Advisory Rules Committee drafted a rule in which both an act of Congress and Supreme Court precedent were overturned Such an action appears better left to the legislative branch than by the committee.

The Requirement of Adverse Consequence

Each *coram nobis* case that has examined the requirement of adverse consequences has been factually different.[4] For example, in *United States v Morgan*, the adverse consequence identified by the Supreme Court involved the possibility of a harsher sentence for the petitioner based on his prior conviction's making him a "second offender " 346 U S. 502, 504 (1954). Presently, this equates to how the U.S Sentencing Guidelines accounts for criminal history in the sentence calculation in every case and at times is used to justify an upward departure from that sentence This is clearly an adverse consequence and was acknowledged as such by the *Morgan* court

Another example is found in *Hirabayashi v United States*, 828 F 2d 591, 606-07 (9th Cir 1987). There, the Ninth Circuit rejected the government's argument that Hirabayashi suffered no continuing adverse consequence from his misdemeanor conviction for failing to comply with a curfew imposed on Japanese aliens and American citizens of Japanese ancestry during WWII. Rather than discussing "continuous and serious" adverse consequences, the court noted that it had "repeatedly reaffirmed the presumption that *collateral consequences* flow from any criminal conviction" and that "[a]ny judgment of misconduct has consequences for which one may be legally or professionally accountable " *Id* at 606-07 (emphasis added).

The *Hirabayashi* court further referenced two Supreme Court cases, *Sibron v New York*, 392 U S. 40 (1968) and *Pollard v United States*, 352 U S 354 (1957) The *Sibron* court held that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction " 392 U.S. at 57. In so holding, the *Sibron* court referred to its previous holding in *Pollard* where the court made a presumption of collateral consequences. *Id* (Citing *Pollard*, 352 U.S at 358 ("The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.")).

[4] A thorough search of case law fails to identify opinions that specifically require a *coram nobis* petitioner to demonstrate "continuing and serious" adverse consequences

It is our position that these collateral consequences include, but are not limited to affecting the ability to seek employment, damage to reputation, being subject to impeachment on cross-examination, restraint of civil liberties including the right to possess firearms, the prior conviction's serving as a predicate offense for such offenses as felon in possession, characterization as an Armed Career Criminal or Career Offender, and being subject to a higher sentence based on criminal history both at the state and federal levels. All of these are serious and continuing adverse consequences Moreover, we propose that the term "collateral consequence" more aptly captures what prior courts have found to satisfy the *coram nobis* requirements.

Burden of Proof for Demonstrating Prejudice and Delay Defined in *Coram Nobis*

"It has been held or recognized that the writ of error *coram nobis* is available, without limitation of time, under 28 U S C 1651 as a remedy in order to vacate a judgment of conviction the sentence for which has been served, and that the laches or delay in applying for the writ is not a bar to relief" Romualdo P Eclavea, Annotation, *Availability, under 28 U S C A § 1651, of writ of error coram nobis to vacate federal conviction where sentence has been served,* 38 A.L.R. Fed 617 (2006) As such, we contend that the burden of proof to demonstrate prejudice from delay in applying for the writ would be on the government

The controlling precedent in this arena is *United States v Morgan*, 346 U.S 502 (1954) *Morgan,* which dealt with a denial of counsel, allowed a complainant to bring an action for writ of error *coram nobis* more than twelve years after the date of conviction In *Morgan*, the Court observed "the writ of *coram nobis* was available at common law to correct errors of fact It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment" *Id* at 507 The Court found this principle to still be important because, "although the term has been served, the results of the conviction may persist Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid" *Id* at 512-513

The court, however, did place a minimal burden on the party bringing the action if there was a delay The Court stated in its ruling that "no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature of the extraordinary writ of *coram nobis* must be heard by the federal trial court" *Id* at 512 Courts have interpreted this to mean that when delay seems to exist, the defendant must show sound reasons for failure to adjudicate the matter in a timely fashion. There has not been a bright line rule established for what is acceptable and what is not.

The general rule—or lack thereof—relating to delay is best summed up by the excerpt below from the American Law Reports *Delay as affecting right to* coram nobis *attacking criminal conviction*

> "In most states the questions whether delay, and what delay, will bar relief by *coram nobis* from a conviction of crime cannot be answered wholly independently of the nature of the grounds of the application, nor of the character of the

judgment as being void or merely voidable, assuming the truth of the matters relied upon to set it aside The most important consideration bearing on the effect of delay is the distinction between a judgment which is void and one which is merely voidable, invalid, erroneous, or affected by some irregularity

In reason, a void judgment can gain no validity from the passage of time, and to uphold one, particularly in a criminal case, merely because of delay in attacking it, even supposing the guilt of the accused, must amount to an abandonment of the law A court cannot well say to a defendant. The trial and the supposed judgment against you are utter nullities, but you may be guilty, and you have been for so long a time wrongfully imprisoned without having corrected the error or oversight occurring at your expense, and without having made legally articulate objections, it is now too late to free you or to clear your name but the courts must leave you where you are precisely as though you had been lawfully committed

So in numerous cases in which the convictions were evidently void, assuming the truth of the allegations made and the affidavits submitted, the view taken was that prolonged delay, even in some cases delay of many years, is not a bar to relief by *coram nobis* And, in void judgment cases, it has been repeatedly held that delay does not constitute a bar though continued until after the sentence has been fully served But in other comparable cases the doctrine adhered to was that great delay, or "unreasonable" delay, or lack of "diligence," may in itself justify a denial of the writ or dismissal of the petition

In cases in which the judgments are not void a variety of considerations may influence the result, according to whether the particular attack is made on grounds of fundamental mistake or oversight resulting in gross injustice or on grounds of error or irregularity concerning matters of a character which when known and dealt with at the trial are ordinarily made grounds of a motion for a new trial or an appeal; and the reasonableness of applying a strict rule of diligence no doubt varies accordingly, and has had an influence on the rulings

In many cases in which the truth of the matters alleged would presumably not render the judgment void, the proposition laid down in regard to time has in substance been that the applicant for the writ is to be held to a rule of reasonable diligence In one case, wherein the conviction was not void, the trial court was held to be without authority to set the judgment aside after the great delay that had occurred

There is very little dissent from the proposition that failure to apply for the writ until after the term at which the conviction was had has expired is not a bar. And, especially when the judgment would be established as void on proof of the matters alleged, the writ need not be applied for within the time allowed for a motion for a

new trial, but a different rule has been laid down regarding complaints of irregularities occurring at or affecting the trial and which could have been made the ground of a motion for a new trial

In Florida it has been said that the writ of *coram nobis* must be applied for within such time, if any, as may have been prescribed for the taking out of writs of error generally, but after writs of error were abolished in Florida and review by appeal substituted, it was declared that an application for *coram nobis* must be made within the time prescribed for an appeal, "unless good cause is shown for a longer delay "

An Indiana statute providing that no court shall have jurisdiction to entertain a *coram nobis* proceeding after the lapse of 5 years from the judgment of conviction was applied in certain cases but was later held to contravene the Fourteenth Federal Amendment Thereafter the Indiana court held that a void judgment may be attacked by *coram nobis* at any time.

A Kansas statute has been construed to remove all objections to delay in applying for *coram nobis* during the time that the "disability" of imprisonment continues

Not time but a species of failure of the judicial process is of the essence of *coram nobis* The writ is conceived as an essential safeguard enabling a court in certain extraordinary cases to reach beyond obstructions and intervals in avoidance of insupportable results It is a sort of birthright not to be exchanged for notions of symmetry or shortsighted convenience, and it must be counted a misfortune when any penchant for rulemaking shall have disabled a court by a proper use of this instrument to deal reasonably and humanely with meritorious cases when and as they are presented Sufficient unto the day is the decision thereof "

W W. Allen, Annotation, *Delay as affecting right to* coram nobis *attacking criminal conviction*, 62 A L R 2d 432 (2006)

These examples demonstrate that the standard should be "good cause" rather than a bright-line 5 year presumption of prejudice

Newly Discovered Evidence and *Coram Nobis*

Though never expressly forbidden by the Supreme Court, as a general rule, newly discovered evidence does not on its own furnish a basis for *coram nobis* relief, *Moody v United States*, 874 F 2d 1575 (11th Cir 1989), *United States v Carter*, 319 F Supp 702 (M D Ga 1969), judgment aff'd, 437 F 2d 444 (5th Cir 1971), at least where such evidence is relevant only

to the guilt or innocence of the petitioner *Moody* at 1577 This rule has been said to apply even in the case of another's confession of guilt *Clark v United States*, 370 F. Supp 92 (W D Pa 1974), aff'd, 506 F.2d 1050 (3d Cir 1974)

"In some situations, however, newly discovered evidence may be a proper ground for granting relief For example, if counsel can demonstrate that the newly discovered evidence was of such a nature that the verdict of the trial court would not have been rendered if the evidence had been presented, *coram nobis* relief may be granted In such a case, however, the attorney advocating for *coram nobis* relief must demonstrate that the new evidence was not known to the defendant or his counsel at the time of the trial and also that it could not have been discovered by either of them in the exercise of reasonable diligence " 18 AM JUR *Trials* §1 (2006).

This is likely the rule because of the requirement that *coram nobis* relief may only be secured if no other remedy is available to the applicant If another remedy is available, such as Rule 33, then that remedy must be utilized Therefore, the exceptional nature of the writ will allow it to be used in only a few limited circumstances It is interesting, however, that in *United States v Morgan, supra* the court states that "the writ of *coram nobis* was available at common law to correct errors of fact " *Morgan* at 507

Whether the List of Remedies Surviving the Rules Should Include Rules 34 & 59(b)

We see no reason why Fed. R Crim P 34, Arresting Judgment or rule 59(b), Dispositive Matters (before a magistrate judge) should not survive Proposed Rule 37 As the ancient writ of *coram nobis* is a post-sentence, last resort remedy, these should function independently and should not be affected by the new rule